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No. 08-1016

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

MCA ASSOCIATES, L.P.,

Petitioner,

v.

TOWNSHIP OF MONTVILLE, NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE
STATE OF NEW JERSEY, AND THE COMMISSIONER OF THE
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

**BRIEF IN OPPOSITION FOR RESPONDENT
TOWNSHIP OF MONTVILLE, NEW JERSEY**

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PRELIMINARY STATEMENT

Respondent, Township of Montville, is an admittedly minor player in this drama. Petitioner, Montville Center Associates, L.P., seeks a writ of certiorari stemming from a judgment of the New Jersey Superior Court, Appellate Division, affirming certain rulings of the trial court in an eminent domain case. In this regard, the Petitioner complains that the trial and state appellate courts gave short shrift to their allegation of inverse taking against the New Jersey Department of Environmental Protection arising from wetlands regulations. The Petitioner believes that these regulations should not have been considered in the Township's direct condemnation case and that the regulations unlawfully diminished the fair market value of the property taken.

Inasmuch as the Township neither promulgated nor enforced the wetlands regulations complained of, the Township should have no interest in this petition. However, because the Petitioner persists in claiming that either the New Jersey Department of Environmental Protection or the Township of Montville is responsible for a vague diminished value due to the application of wetlands regulations, the Township is compelled to respond and oppose the writ sought. To this end, it is the Township's position that a writ of certiorari should not be granted because the Petitioner fails to advance a ground sufficient for such relief and the Petitioner's Fifth Amendment rights were not violated.

COUNTERSTATEMENT OF THE CASE

On November 17, 2002, the Respondent, Township of Montville [hereinafter referred to as "Township"], filed an order to show cause and verified complaint for the condemnation of real property owned by Petitioner, Montville Center Associates, L.P. [hereinafter referred to as "MCA"]. The public purpose authorizing the Township's exercise of eminent domain adjudicated by the order to show cause was not opposed or appealed by MCA. On December 19, 2002, the Township took title to the real property by the filing of a Declaration of Taking. The case then proceeded to the valuation stage of the condemnation.

During the valuation stage of the proceedings, MCA sought an *in limine* determination of the legal effect of a 1977 Consent Judgment on the valuation of the real property. The 1977 Consent Judgment was entered into between MCA's predecessor in title and Respondent, New Jersey Department of Environmental Protection [hereinafter referred to as "N.J.D.E.P."] and was concerned with the implementation of the Flood Hazard Area Control Act on the subject property. It was MCA's contention that the 1977 Consent Judgment precluded the application of the New Jersey Freshwater Wetlands Act, codified at N.J.STAT.ANN. § 13:9B-1 *et seq.* [hereinafter referred to as "Act" or the "Freshwater Wetlands Act"], enacted later in 1987, from being considered an environmental development constraint for the purposes of valuing the subject property. The trial court determined that the 1977 Consent Judgment did not bar subsequently enacted environmental regulations from being applicable to the property for purposes of valuation.

Thereafter, MCA filed a third-party complaint against the N.J.D.E.P. alleging the Freshwater Wetlands Act constituted an inverse or regulatory taking by diminishing the value of the subject property. Ultimately, the trial court dismissed the third-party complaint and the Township and MCA settled on a value of \$2,648,500.00 for the property subject to MCA's right to appeal the trial court's *in limine* ruling and dismissal of the third-party complaint. The New Jersey Superior Court, Appellate Division, affirmed the trial court's rulings and the New Jersey Supreme Court denied certification. Petitioner here does not complain of the trial and appellate courts' construction of the 1977 Consent Judgment, but only complains of the dismissal of the complaint for inverse taking alleging a violation of the Petitioner's Fifth Amendment protections.

ARGUMENT IN OPPOSITION TO THE PETITION

POINT ONE

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER DID NOT SUFFER ANY DEPRIVATION OF FIFTH AMENDMENT RIGHTS AS PETITIONER WAS JUSTLY COMPENSATED FOR PROPERTY TAKEN FOR A PUBLIC PURPOSE.

The Petitioner asserts that it "should be afforded an opportunity to seek damages for the diminution in value to the subject property . . . [and] present its analysis of the facts under the *Penn Central* formula . . ." (Petitioner's Brief 12). This very statement, however, demonstrates the Petitioner's misconception of inverse taking jurisprudence and misstates the analysis performed by both the trial and appellate courts below.

Taking these points in reverse order, while the Petitioner claims that it was not afforded an opportunity to present argument as to the standards set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), in fact, the Petitioner not only argued the *Penn Central* factors in both the trial and appellate courts, both the trial and appellate courts engaged in the *Penn Central* analysis and were not persuaded. (Petitioner's Appendix 15a-16a). In this regard, while the courts below dismissed the third-party complaint on an issue of standing, the dismissal would have nonetheless resulted under a *Penn Central* analysis. Quite simply, the application of the Freshwater Wetlands Act did not deprive the Petitioner of all economically viable use of its property – a fact made plain by the \$2,640,500.00 in compensation paid to the Petitioner despite the application of the freshwater wetlands regulatory constraints. Indeed, the compensation paid to MCA disproves that an inverse taking occurred.

Under the rubric of *Penn Central*, a party making a regulatory takings claim must demonstrate the character of the government action, the economic impact of the regulation on the property owner and the extent to which the regulation interferes with distinct investment-backed expectations of the property owner. *Id.* at 124. Here, the Petitioner's claim fails because the Freshwater Wetlands Act did not objectively thwart the investment-backed expectations of MCA, nor did it have an economic impact of a Constitutional dimension. The property retained significant value.

The Petitioner's belief that it should somehow be compensated for a diminution in value of the land caused by the Freshwater Wetlands Act demonstrates the Petitioner's misconception of the legal standard applicable to a regulatory taking. Simply, regulations that diminish value do not necessarily result in a Constitutional taking. See *Penn Central*, *supra*, 438 U.S. at 124; *Palazzolo v. Rhode Island*, 533 U.S. 606, 627, 121 S. Ct. 2448, 2462, 150 L. Ed. 2d 592 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018, 112 S. Ct. 2886, 2894, 120 L. Ed. 2d 798 (1992); and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S. Ct. 158, 159, 67 L. Ed. 322 (1922) (stating that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). It is been said that inverse condemnation and direct condemnation are "opposite sides of the same legal coin." 2 Nichols, *Eminent Domain* (Sackman ed. 1985) § 6.21(1). However, as this Court recognized in *Lucas*, *supra*, 505 U.S. at 1015, the inverse condemnation side of the coin has itself two faces – a government's uncompensated physical invasion of property and a government's regulation of property that denies all beneficial or productive use of property. In dealing with the latter, this Court has remained steadfast in its belief that reasonable regulations that do not deprive the owner of all beneficial use rarely rise to the level of a compensable taking. See *Lucas*, *supra*, 505 U.S. at 1019 and *Palazzolo*, *supra*, 533 U.S. at 617 (these cases stating the Court's belief that a taking occurs when regulations deny *all* economically beneficial or productive uses of land).

In this case, MCA was paid fair market value of the property directly taken by the Township, based upon the property's highest and best use considering the physical and legal regulatory constraints affecting the property. While the application of the Freshwater Wetlands Act undoubtedly affected the property's value, the property nonetheless retained significant development potential, and consequently value, as demonstrated by the compensation paid, notwithstanding the application of the Act. Accordingly, the Petitioner did not suffer a regulatory taking offensive of the Fifth Amendment and the petition should be denied.¹

Additionally, the Petitioner urges that either the N.J.D.E.P. or the Township is responsible for the diminution of value caused by the Freshwater Wetlands Act. On this account, however, the Petitioner proffers no law assigning such responsibility to the Township by way of its direct taking. The state courts below interpreted the 1977 Consent Judgment so as to require the value of the subject property to reflect the application of the Freshwater Wetlands Act. Insofar as the Township, as the direct condemnor, was required pursuant to N.J.STAT.ANN. § 20:3-19 to provide just compensation to MCA based upon the value of the

1. The folly of Petitioner's underlying thesis is splayed open when a general rule is considered. If the Petitioner were correct in its argument, then any time vacant property is directly taken by a government, the property owner would be permitted to pursue a value that would account for diminutions created by zoning, environmental, and similar regulations that limit a property's development potential. Such a result is antithetical to the well established law of direct and regulatory takings.

highest and best use of land acquired, and such compensation was paid by the Township, the Township is not legally obligated to pay any additional compensation for a perceived diminution of value based upon regulations the Township did not impose or promulgate.

POINT TWO

A WRIT OF CERTIORARI SHOULD NOT ISSUE BECAUSE PETITIONER FAILS TO ADVANCE A SUFFICIENT GROUND OR COMPELLING REASON FOR SUCH RELIEF.

As provided by the Rules of this Court, a writ of certiorari should only be granted for compelling reasons. Here, Petitioner implicates Sup.Ct.R. 10(b) as a basis for consideration, which provides "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." In this cause, the determination of the Supreme Court of New Jersey, by and through its denial of certification of the Appellate Division's judgment, neither fundamentally conflicts with an on point decision of another state court of last resort, nor does it conflict with a decision of a United States court of appeals. More importantly, however, the decision rendered below does not implicate an important federal question that offers a compelling reason for issuing the requested writ.

The Petitioner urges that the dismissal of a third-party inverse takings claim for lack of standing subsequent to a direct taking violates its Fifth

Amendment protections. On this account, Petitioner cites four decisions from sister states in an effort to support a conflict on the standing issue. However, Petitioner's reliance on the cited authorities is misplaced, as these particular cases are legally and factually distinguishable from the instant matter, and several do not arise from the sister states' courts of last resort.

Petitioner cites *Albahary v. City of Bristol*, 276 Conn. 246, 886 A.2d 802 (2005); *Red Mountain v. Fallbrook Public Utility District*, 143 Cal.App.4th 333, 48 Cal.Rptr.3d 875 (App. 2006); *Shealy v. Unified Government of Athens-Clarke County*, 244 Ga.App. 853, 537 S.E.2d 105 (2000); and *City of Lake Station v. Rogers*, 500 N.E.2d 235 (Ind. 1986) for the proposition that a property owner retains standing to sue for inverse condemnation after a direct taking has occurred. Of these four cases, only one issued from the court of last resort.

More importantly, however, none of the cited cases address a claim of inverse taking by way of regulation. Rather, the cited cases all concern standing for an inverse or partial takings claim by way of a physical invasion into lands or title interests. As indicated in point one *supra*, there is a significant difference between an inverse taking by regulation and one by physical invasion. Taken in turn, *Albahary v. City of Bristol*, 276 Conn. 246 (2005) is a case concerning pre-taking damages to property caused by ground water contamination – a physical invasion. There, the Supreme Court of Connecticut held that a property owner does have standing to claim inverse taking damages

secondary to contamination in the context of a direct taking by the government to account for the diminution in value caused by such contamination. It is worthy to note that in New Jersey, no such inverse takings claim would be required to assure the just compensation for property directly condemned that is contaminated. Such properties are valued as if fully remediated and without contamination, leaving the condemning authority to later seek off-setting remediation costs from prior responsible parties. *Housing Authority of the City of New Brunswick v. Suydam Investors, LLC*, 177 N.J. 2 (2003), 826 A.2d 673 (2003). In MCA's case, there was no prior governmental physical invasion, contamination or any pre-taking damage to the property. There was simply zoning and environmental regulations that limited the scope of potential development.

Likewise, in *Red Mountain v. Fallbrook Public Utility District*, 143 Cal.App.4th 333 (2006), the California appellate court considered a standing issue quite different from the case at bar. There, the government's denial of an access easement precluded reasonable development of the condemnee's land, thus creating an inverse taking. The government there, however, also instituted a direct condemnation of a smaller portion of the land to foreclose any alleged easement and take fee title to same. In this regard, the hostile title actions of the government prior to the direct taking substantially reduced the value of the land and value of the fee taken by condemnation. In fact, there the court clearly stated that the direct and inverse takings claims "did not involve the exact same property, legal issues or damages." *Id.* at 357.

Like *Albahary*, the case of *Shealy v. Unified Government of Athens-Clarke County*, 244 Ga.App. 853 (2000) is one of physical invasion by contaminants. There, the appellate court of Georgia held that because of the distinct nature of the loss and diminution of value secondary to contamination was distinct from the direct condemnation, such action was not moot and the diminution of value from the contamination was actionable. Again, in this pre-taking contamination context, the law of New Jersey would not require two distinct actions equitably to fix value.

Finally, *City of Lake Station v. Rogers*, 500 N.E.2d 235 (Ind. 1986) presents a case where property taken by a direct condemnation was previously utilized by the condemning authority as a garbage dump and for the extraction of sand for which the property owner was not compensated. There, the appellate court of Indiana held that the inverse taking by depriving the prior owner of mineral profits was actionable. Importantly, however, under the law of Indiana, the compensation related to the direct taking is for the condition of the property at the time of taking. *Id.* at 239. Therefore, like in *Albahary* and *Shealy*, the direct taking did not account for value lost because of prior physical invasion of the property by the condemning authority, thus requiring a separate action for the equitable recovery of value deprived by the government's actions.

The case at bar involves an allegation that wetlands regulations, not a physical invasion, diminished the value of the property. Clearly, the standing issues resolved by the cited cases are distinguishable from this matter, as those cases address a condemning authority's physical

invasion of property that substantially reduced the value of property prior to direct takings. Inasmuch as the cited cases are factually and legally distinguishable from the decision rendered in the instant case, it is respectfully submitted that the Petitioner has failed to demonstrate a conflict of a federal question sufficient to compel the issuance of the requested writ.

CONCLUSION

For the reasons stated above, Respondent, Township of Montville, respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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